

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of
Housing and Urban Development, on behalf
of George Spinner,

Charging Party,

v.

Housing Authority of the City of Reno,

Respondent.

HUDALJ 09-97-1291-8

**INITIAL DECISION AND ORDER
DENYING APPLICATION FOR ATTORNEYS' FEES**

On August 19, 2002, Respondent, as prevailing party, filed application for attorneys' fees and costs as permitted by 24 C. F. R. § 180.705. The Charging Party filed timely opposition to Respondent's application (*see* 24 C.F. R. § 14.310), and Respondent was given until October 15, 2002, to file a reply to the opposition. To date a reply has not been received. The matter is now ready for decision.

On June 19, 2002, I issued an Order Granting Respondent's Motion for Summary Judgment, dismissing a Charge of Discrimination alleging that Respondent failed to reasonably accommodate the Complainant's disability in violation of the Fair Housing Act, on the ground that the Charging Party had failed to establish an essential element of its *prima facie* case, i.e. that the requested accommodation was necessary to afford the Complainant an equal opportunity to use and enjoy his apartment. That decision on the Motion became the final decision of the Department on July 19, 2002.

Respondent now seeks attorneys fees and costs, pursuant to the Equal Access to Justice Act ("EAJA") codified at 5 U.S.C. § 504. *See also* 24 C.F.R. part 14, and 24 C.F.R. § 180.705. Respondent seeks total attorneys' fees of \$24, 371.00 and costs totaling \$4037.09. The Charging Party argues 1) that its position in the litigation was substantially justified and, therefore, that no award should be granted; and 2) that if an award is granted, Respondent is not entitled to the amount of fees claimed. The Application will be *Denied*.

The Fair Housing Act provides that a prevailing party in a proceeding is entitled to recover attorney's fees unless the adjudicative officer finds that the position of the agency was not "substantially justified." See 42 U.S.C. §3612(p), 24 CFR 180.705 and 24 CFR part 14. See also 5 U.S.C. § 504 (a) (1), (c)(2), and (b)(1)(B). A prevailing party is one whose success on significant issues achieves sought after results. See *Busche v. Burkee*, 649 F.2d 509, 521 (7th Cir.), cert. denied, 454 U.S. 897 (1981); see also *Dixon v. City of Chicago*, 948 F.2d 355, 357-358 (7th Cir. 1991).

It is clear that Respondent is a "prevailing party" in this case. The issue then is whether the Charging Party's position was "substantially justified." The burden of proof that the Charging Party's position was substantially justified rests with the Charging Party. 24 C.F.R. § 14.125(b). The Charging Party argues that its position was substantially justified.

Substantial Justification

The term "substantially justified" means "justified in substance or in the main -- that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). It means "more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for the Government's litigation of which a reasonable person would approve." *Id. at 567*. Thus, the "substantial justification standard applied under the EAJA treads a middle ground between an automatic award of fees to the prevailing party and one made only when the Government has taken a patently frivolous stand." *Losco v. Bowen*, 638 F. Supp. 1262, 1265 (S.D.N.Y. 1986). Under the substantial justification standard, the tribunal "only considers whether there is a reasonable basis in law and fact for the position taken by the Secretary." *Welter v. Sullivan*, 941 F. 2d 674, 676 (8th Cir. 1991). The Charging Party must have a solid though not necessarily correct basis in fact and law for the position that it took in the action. *HUD v. Carlson*, FH - FL (Aspen) ¶ 25,132 (HUDALJ 1997).

The fact that the agency lost the case, does not mean that the agency's position was not "substantially justified." *Pierce*, 487 U. S. at 569. See also *Brouwers v. Bowen*, 823 F.2d 273 (8th Cir. 1987). The EAJA is not an automatic fee-shifting statute. *Spencer v. N. L. R. B.*, 712 F. 2d 539, 550 (D.C. Cir. 1983). Moreover, the fact that summary judgment was granted does not mean that the agency's position was not "substantially justified." The determination entails "[looking] at the entirety of the Government's conduct [to] make a judgment call whether the Government's overall position had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F. 2d 711, 715 (Fed. Cir. 1991).

Whether the position of the Charging Party was substantially justified in this case must be determined on the basis of the record, as a whole. 5 U.S.C. 504(a). Considering the record as a whole, I find that the Charging Party was substantially justified in litigating in this case.

The Charging Party had a reasonable basis in fact for its litigating position, i.e. its claim that Respondent failed to reasonably accommodate the Complainant's disability. The Charging Party charged Respondent for failing to accommodate the Complainant's handicap by failing to take a specific action, i.e. treat his meal expense as a "medical expense" for the purpose of calculating his contribution to rent payment. In my Order granting the motion for summary judgment, I concluded that the Complainant, indeed, had a disability-relation limitation that required accommodation, but that the Charging Party had failed to make a prima facie showing that the requested accommodation was a necessary one. Although I concluded that the specific accommodation requested was not necessary to accommodate the Complainant's disability, the Charging Party had a factual basis for believing that some accommodation was necessary because of the Complainant's demonstrated handicap, and a legal basis for its claim that since the Respondent knew of the Complainant's handicap, and his need for some accommodation, it had an obligation to reasonably accommodate his handicap.

Conclusion and Order

Considering the case in its entirety, the Charging Party was substantially justified in bringing the Charge of Discrimination. Respondent's Application for Attorney's Fees and Costs is hereby DENIED.

This Initial Decision shall become the final decision of the Secretary unless the Secretary reviews the decision within 30 days. 24 C.F.R. 180.705.

So ORDERED, this 15th day of November, 2002.

CONSTANCE T. O'BRYANT

Administrative Law Judge